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No. 01-

IN THE

Supreme Court of the United States

MISSOURI REPUBLICAN PARTY, *et al.*,

Petitioners,

v.

ROBERT F. CONNOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal limit on political party coordinated expenditures in the Missouri 2002 general election is $603,576. The state limit on a party's combined cash and in-kind contributions is $23,350. The question presented is whether courts must make a case specific inquiry to determine the extent to which speech is suppressed by particular campaign finance regulations.

PARTIES TO THE PROCEEDING

The petitioners are the Missouri Republican Party (a political party committee), Pierce for Auditor (a candidate committee), Charles A. Pierce, Marc Ellinger, Citizens for Eric Zahnd (a candidate committee), Eric Zahnd, and Lee R. Keith. Citizens to Elect Mike Reid (a candidate committee), Michael J. Reid, and Elaine Tschee Reid were parties to the original action. On March 1, 2002, the State of Missouri withdrew its claims against these three parties, and they are no longer parties to the proceeding.

The respondents are Robert F. Connor, in his official capacity as Executive Director of the Missouri Ethics Commission, Jeremiah W. Nixon, in his official capacity as Missouri Attorney General, and James E. Spain, Sandra Donahue, and Philip Conger, in their official capacities as Members of the Missouri Ethics Commission. Spain, Donahue, and Conger replaced Patricia Flood, Robert Gardner, and Richard Adams, who were members of the Missouri Ethics Commission when the suit was filed. Mike Greenwell, Donald Gann, Elaine Spielbusch were also members of the Missouri Ethics Commission when the suit was filed, but the terms of their offices have now expired. In March 2002, Robert F. Connor replaced Charles G. Lamb, who was the Executive Director of the Missouri Ethics Commission when the suit was filed.

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The Missouri Republican Party and two of its 1998 candidates respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is reported at 270 F.3d 567 (8th Cir. 2001). The court of appeals Order denying a petition for rehearing and for rehearing en banc (Pet. App. C) is not reported. This Court's Order (No. 01-A531) denying an application to stay the court of appeals mandate is not reported.

The initial decision of the court of appeals (Pet. App. B) is reported at 227 F.3d 1070 (8th Cir. 2000). This Court's Order granting Missouri's petition for certiorari, vacating the initial judgment, and remanding for consideration in light of *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*) is reported at 121 S. Ct. 2584 (2001).

The opinion of the district court is reported at 100 F. Supp. 2d 990. The district court's decision entering a preliminary injunction is reported at 31 F. Supp. 2d 1161, and its decision denying Missouri's motion to vacate the preliminary injunction is reported at 87 F. Supp. 2d 912. Petitioners have lodged copies of these district court decisions with the Court, and they are also set out in the appendix to Missouri's petition for a writ of certiorari to review the court of appeals initial judgment. *Jeremiah W. (Jay) Nixon v. Missouri Republican Party* (No. 00-1136) (Jan. 9, 2001).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 2, 2001, and it denied a timely petition for rehearing and rehearing en banc on January 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment, as applied to the states through the Fourteenth Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const.: Amend. I.

This case also involves the Missouri statute limiting cash and in-kind contributions made by political parties to their candidates:

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, ten thousand dollars;

(2) To elect an individual to the office of state senator, five thousand dollars;

(3) To elect an individual to the office of state representative, two thousand five hundred dollars; and

(4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

The amount of contributions which may be made by or accepted from a political party committee in the primary election to elect any candidate who is unopposed in such primary shall be fifty percent of the amount of the allowable contributions as determined in this subsection.

Mo. Rev. Stat. § 130.032.4.

STATEMENT OF THE CASE

In the November 2002 statewide general election, the Missouri limit on a political party's cash contributions to a candidate is $11,675 and the limit on a party's in-kind (non-monetary) contributions is $11,675. Pet. App. D. In the 2002 statewide Missouri election for the United States Senate, the federal limit on party coordinated expenditures is $603,576. The court of appeals held that *Colorado II*, 533 U.S. 431, "establishes as a matter of law the constitutionality" of the Missouri party contribution limits and that "no predicate record-making by the state of Missouri is necessary before the validity of its statute can be established." Pet. App. A at 5a.

1. The Missouri Republican Party (MRP) is a political party committee organized under Missouri law. The party's goals are to take control of state government by electing its candidates and, in turn, to implement Republican policies and principles.

2. In 1996 Missouri imposed $250, $500, and $1000 limits on contributions made by individuals and political action committees (PACs) to candidates. Mo. Rev. Stat. § 130.032.1. The state also limited contributions made by a "political party committee" in support of its candidates on a sliding scale from $2500, to $5000, to $10,000. *Id.* § 130.032.4. Each even-numbered year, these contribution limits "shall be increased" to take inflation into account. *Id.* § 130.032.2.

3. The court of appeals enjoined enforcement of the individual and PAC limits on July 23, 1998. *Shrink Missouri Government PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998). This injunction was in effect throughout the remainder of the 1998 general election and throughout 1999. After this Court upheld Missouri's $1075 limit on individual and PAC contributions on January 24, 2000 in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the court of appeals lifted its injunction.

4. While the court of appeals' July 23, 1998 injunction was in effect and at the close of the 1998 general elections, the MRP contributed $133,500 to Charles Pierce (a Republican candidate for statewide office), $73,750 to Eric Zahnd (a Republican state senate candidate), and $8300 to Mike Reid (a Republican state house candidate). The MRP made these contributions to the three candidates because it had "targeted" their races — that is — the party believed that the election of Pierce, Zahnd, and Reid was critical to the party's

goal of taking control of the executive and legislative branches of government. If, for example, Zahnd and one more targeted Republican state senate candidate had both won their races, then the MRP would have gained control of the state senate for the first time in the last half of the twentieth century.

5. The MRP reported these contributions to the Missouri Ethics Commission (MEC). Given certain representations by the MEC, the party believed that there were no enforceable limits on party contributions in the November 1998 general elections and that its contributions to Pierce, Zahnd, and Reid were legal. The party also believed that enforcement of the party limits served no purpose while enforcement of the individual limits was enjoined. When the MRP made its contributions to Pierce, Zahnd, and Reid at the end of the 1998 general elections, there were no individual contribution limits that could have been circumvented by unlimited party contributions. Any individual or PAC could have made unlimited contributions directly to Pierce, Zahnd, and Reid. Response To Missouri's Application For Stay Pending Petition For Writ Of Certiorari (No. 00-A241) (Sept. 25, 2001) Exh. #1 (Affidavit Of John Hancock, Exec. Dir. Missouri Republican Party) ¶¶ 56, 62, 66; *see id.* at ¶¶ 45-75.

6. The MEC determined that state law prohibited the MRP from making cash payments of more than $10,750 to its statewide candidate, of more than $5375 to its state senate candidate, and of more than $2700 to its state house candidate. It claimed that the MRP was liable in the amount of $201,725 for "overlimit" contributions, that Pierce was liable in the amount of $126,500, that Zahnd was liable in the amount of $68,375, and that Reid was liable in the amount of $6600.

7. The MRP and its candidates Pierce, Zahnd, and Reid invoked the jurisdiction of the district court under 28 U.S.C. § 1331 to determine the validity of state limits on cash and in-kind contributions made by political parties to their candidates. Although the district court initially enjoined enforcement of the party limits, it granted the state's motion for summary judgment on June 22, 2000 and upheld the party limits. L-1.

8. On September 11, 2000, the court of appeals reversed the district court and held that Missouri's limits on a political party's cash and in-kind contributions to its candidates violate the First Amendment. Pet. App. B. It found that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." *Id.* at 18a.

9. On June 25, 2001, this Court held that federal limits on a political party's coordinated expenditures are valid on their face. *Colorado II*, 533 U.S. 431.

10. On June 29, 2001, the Court granted Missouri's petition for certiorari, vacated the court of appeals' September 11, 2000 judgment, and remanded the case for consideration in light of *Colorado II*. 121 S. Ct. 2584 (2001). On remand, the court of appeals upheld the Missouri party contribution limits. Pet. App. A.

REASONS FOR GRANTING THE WRIT

The court of appeals generic approval of party contribution limits — regardless of the amount of the limits or their effects — threatens significant erosion of First Amendment protection of political speech. Review of the court of appeals decision is necessary to ensure that the lower courts fulfill their constitutional responsibility to make a case specific determination that campaign finance regulations are closely drawn to achieve a sufficiently important interest. Review of the court of appeals decision will also prevent a significant miscarriage of justice.

I. The Court of Appeals Decision Is Inconsistent With *Shrink Missouri* and *Lorillard Tobacco*

The court of appeals did not make a case specific inquiry whether the Missouri party limits are "closely drawn" to match a "sufficiently important" interest. *Colorado II*, 533 U.S. at 456; *Shrink Missouri*, 528 U.S. at 388; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Instead, it assumed, contrary to *Shrink Missouri*, that "the factual record developed in *Colorado II*," Pet. App. A at 4a, which would justify a $603,576 federal limit on coordinated expenditures, justifies state limits of $11,675 on a political party's cash and in-kind contributions. It also failed to determine the "[t]he degree to which speech is suppressed . . . under [the Missouri] regulatory scheme." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001).

A. The court of appeals holding that *Colorado II* establishes as a matter of law the validity of the Missouri party limits is wrong. Pet. App. A at 5a. *Colorado II* did find that coordinated expenditures could be used to circumvent limits

on individual contributions and that government may limit party contributions to minimize circumvention of individual contribution limits. *Colorado II*, 533 U.S. at 465. The Court did not hold, however, that all party contribution limits are automatically valid. Indeed, it upheld federal limits on coordinated expenditures only on their face and not as applied. *Id.* at 456 n.17, 465.

Thus, even though coordinated expenditures "may be restricted to minimize circumvention of contribution limits," *id.* at 465, the court of appeals still had " 'an over-arching commitment' to make sure that [Missouri] has designed its statute to accomplish [this] purpose 'without imposing an unnecessarily great restriction on speech.'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 876 (1997) (*quoting Denver Area Ed. Telecommunications Consortium v. FCC*, 518 U.S. 727, 741 (1996)). The court of appeals, however, ignored its duty under *Shrink Missouri* and *Lorillard Tobacco* to make a case specific inquiry to determine the validity of the Missouri party limits.

B. In the 2002 general election for the United States Senate, the federal limit on party coordinated expenditures in Missouri is $603,576.[1] In the 2002 statewide general election,

1. The coordinated party expenditure limit for 2002 Senate nominees in Missouri is $301,788. Federal Election Commission, 28 RECORD 15 (March 2002). Both the national committee of a political party and the state committee can spend this sum, 11 C.F.R. § 110.7, and, as a result, the actual limit on the amount that a party can spend in the 2002 general election to support its Senate candidate is doubled to $603,576. The state committee and the national committee can designate a common agent for the purpose of spending their allotments. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981).

the state limit on a political party's cash contribution is $11,675 and the limit on in-kind contributions is $11,675. Pet. App. D at 29a-30a. The federal limit is more than twenty-five times higher than the combined $23,350 state law limit on cash and in-kind party contributions.[2] It does not take a "scalpel" to probe this $580,000 difference between the federal and state limits. *Buckley*, 424 U.S. at 30.

The court of appeals, nonetheless, held that "the factual record developed in *Colorado II*" is sufficient under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to sustain the state limits on party contributions. Pet. App. A at 4a. As *Shrink Missouri* illustrates, the court of appeals erred in applying *Renton* to justify the state party contribution limits.[3] In *Shrink Missouri*, the state's $1075 limit on individual contributions was directly analogous to the $1000 federal limit upheld in *Buckley*. This Court permitted

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2. In a contested primary election for statewide office, a political party may make a cash contribution up to $11,675 and an in-kind contribution up to $11,675 to a candidate. In an uncontested primary, a party may make a cash contribution up to $5837.50 and an in-kind contribution up to the same amount. Pet. App. D at 29a-30a. Primary contributions and general election contributions are not fungible. Although the Missouri Republican Party does make contributions in some primary elections, the general election is the main event in the contest for control of state government, and contributions made long before any party has selected a standard bearer are not as effective as contributions made in the general election itself.

3. A question of government's evidentiary burden under *Renton* to justify restrictions on adult entertainment businesses, as opposed to restrictions on political speech, is now before the Court. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 532 U.S. 902 (2001) (No. 00-799) (Argued December 4, 2001).

Missouri under *Renton* to rely on evidence before Congress, only as "substantiated" by Missouri's own evidence of harm in state elections. 528 U.S. at 393-94 & n.6. Here, however, the court of appeals excused Missouri from making any record to justify its party contribution limit. Pet. App. A at 5a ("no predicate record-making by the state of Missouri is necessary before the validity of its statute can be established").

If the Missouri limit on individual contributions at issue in *Shrink Missouri* had been only $40, or 1/25th of the $1000 federal limit, there is no reason to believe that this Court would have permitted the state to rely on evidence in *Buckley* about $1000 contributions in federal elections and excused Missouri from making any record to justify a $40 limit on individual contributions.

In this case, where the state limit on party contributions is about 1/25th of the federal coordinated expenditure limit, the court of appeals erred in permitting Missouri to rely solely on *Colorado II* and in tacitly speculating that political party contributions of $23,350 cause the same problems in state elections as coordinated expenditures of $603,576 in federal elections. This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Shrink Missouri*, 528 U.S. at 392; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring in part and dissenting in part) (same); *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000) (government "must present more than anecdote and supposition").

C. Even though the $603,576 federal limit on coordinated expenditures in Missouri is twenty-five times higher than

the combined $23,350 state limit on a party's cash and in-kind contributions, the court of appeals did not make a case specific determination of the extent to which the state regulations suppress political speech and association.

Without ever acknowledging the actual size of the federal limit on coordinated expenditures, the court of appeals simply characterized the Missouri party limits as "much lower." Pet. App. A at 5a. It then asserted that "[n]othing in this record would indicate" that the Missouri party limits are " 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.'" *Id.* (*quoting Shrink Missouri*, 528 U.S. at 397).

Given the posture of case, there was no basis for the court of appeals assertion that the party limits are within the bounds set by *Shrink Missouri*. More importantly, this assertion does not satisfy the court's duty to determine "[t]he degree to which speech is suppressed . . . under a particular regulatory scheme." *Lorillard Tobacco*, 533 U.S. at 563 (*citing Renton*, 475 U.S. at 53-54).

1. The court of appeals assertion about the Missouri party limits ignores the fact that the record is not fully developed. The district court's decision to grant the state's motion for summary judgment cut short the development of the record. For example, Missouri produced a computer disk late in the course of discovery. *See* Missouri's Response To Second Request For Production (May 30, 2000). The disk contains comprehensive data for an eight year period from 1992 through 1999 about contributions made to the MRP and, in turn, made by the party to its candidates, and it comprises some 238 (11" by 17") printed pages. No court has ever examined this

political party contribution data in the light of *Colorado II*, or even for that matter *Shrink Missouri*, to determine the extent to which the party limits suppress political speech.

The court of appeals, moreover, never had any occasion to review completely the limited district court record. It held initially that the Missouri party limits were unconstitutional "on their face." Pet. App. B at 19a. It found that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." *Id.* at 18a.

The court of appeals had no occasion to consider the effects of the party limits on the MRP. For example, it did not have to address the question whether the district court erred in applying *Shrink Missouri* to assess the effects of the party limits on *candidates* instead of assessing the effects of the party limits on *political parties*. *See* L-20 to L-23. Similarly, the court of appeals did not have to address the question whether the burdens imposed on the MRP have a systemwide effect of suppressing political advocacy under *Shrink Missouri*.[4]

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4. The appeal raised the question whether Missouri had demonstrated on its summary judgment motion that there were no genuine issues about the effects of the party limits on the MRP's ability to use primaries to field its best candidates, to recruit candidates with seed money, and to target financial support to candidates whose success is necessary to achieve the party's goal of taking control of state government. The MRP argued that all these burdens had a systemwide effect of suppressing political advocacy under *Shrink Missouri* because the very goals of a political party are systemwide – to take control of state government and implement party policies on a systemwide (statewide) basis.

On remand, the court of appeals ordered supplementary briefs and heard argument, but it never gave the MRP any opportunity to show that the state limits are radically different than the federal coordinated expenditure limits in their effects on political parties and on political speech and association.

2. Just as the degree to which speech is suppressed by a 1000 foot restriction on commercial advertising may vary in rural, suburban, and urban locations, the degree to which speech is suppressed by a $603,576 limit, as opposed to a $23,350 limit, may well be very different. *See Lorillard Tobacco*, 533 U.S. at 562-63.

At some point, limits on party contributions may be " 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.' " *Shrink Missouri*, 528 U.S. at 397. Absent some case specific inquiry into effects of the combined $23,350 limit on cash and in-kind contributions, however, the court of appeals could not determine whether Missouri has crossed this First Amendment line.

II. Generic Approval Of Campaign Finance Regulations Erodes First Amendment Rights

The court of appeals failure to make a case specific inquiry significantly and invisibly erodes important First Amendment rights.

A. Reading *Colorado II* as a generic approval of all party contribution limits, the court of appeals ignored the Court's warning that party contribution limits may be invalid as applied to expenditures that involve more of the party's own

speech than payment of a candidate's bills. *Colorado II*, 533 U.S. at 456 n.17; *see id.* at 469 n.2 (Thomas, J. dissenting). The court of appeals indiscriminately upheld state limits on in-kind contributions, as well as limits on cash contributions, even though in-kind contributions are primarily the party's own speech.

In-kind contributions, which state law defines interchangeably with in-kind expenditures, are primarily the party's own speech because the party controls completely the in-kind support that it provides to its candidates. *See* Mo. Rev. Stat. § 130.011(19) (defining an "in-kind contribution" or "in-kind expenditure" as "a contribution or expenditure in a form other than money"). In-kind contributions or expenditures made by the MRP to support its candidates include assistance in campaign and finance planning, access to voter and contributor lists, use of office facilities and office machines, research about the opposing party and its candidates, and the development and mailing of campaign literature setting forth the views of the party and its candidates.

The party's ability to provide this in-kind support for its candidates is a crucial component of the party's efforts to take control of state government. The party's expenditures to provide its candidates with in-kind support are critical to the party's ability to advocate its ideas effectively. In-kind expenditures are so important (and the burdens of precise accounting of services provided to a multitude of candidates are so substantial) that the state's two major political parties had an informal agreement for many years not to enforce the limits on in-kind contributions.

Although the court of appeals initially held that state law limits on in-kind contributions, as well as on cash contributions, were unconstitutional, Pet. App. B at 18a-19a, it did not make this distinction on remand. Its decision upholding limits on in-kind contributions and expenditures will have a substantial — but never considered — effect on party expenditures that are more the party's own speech than the payment of its candidates' bills.

B. Reading *Colorado II* as a generic approval of all party contribution limits, the court of appeals ignored the actual effects of the cash and in-kind limits on the Missouri Republican Party's ability to compete for control of state government and to implement Republican policies.

The MRP, like all political parties, "targets" its financial support to candidates who have a chance of winning races that will help the party achieve its objective of capturing control of the state legislature. The importance of "targeting" party support (cash and in-kind) is demonstrated by the fact that a switch of about 3,000 votes in key legislative districts would have permitted the MRP in 1996 to win a majority in the Missouri house and senate for the first time in almost fifty years. The party contribution limits will have a severe effect on the MRP's ability to "target" its financial support in future elections because in every single targeted race from 1988 to 2001 with the exception of 1996 (when the limits were in effect), the MRP's support for targeted Republican candidates far surpassed the limits. *See* Response To Missouri's Application For Stay Pending Petition For Writ Of Certiorari (No. 00-A241) (Sept. 25, 2001) Exh. #1 (Affidavit Of John Hancock, Exec. Dir. Missouri Republican Party) ¶32.

The court of appeals did not consider the effects of the combined $23,350 limit on cash and in-kind contributions. The erosion of political parties' First Amendment interests in competing for control of state government is the unexamined byproduct of a generic approval of party contribution limits.

III. A Case Specific Inquiry Is Necessary To Prevent A Significant Miscarriage of Justice

In *Colorado II*, the Court expressly recognized that the federal limits on coordinated expenditures, while valid on their face, might nonetheless be invalid as applied. 533 U.S. at 456 n.17. On remand, however, the court of appeals did not distinguish between the validity of the party limits on their face and the validity of the limits as applied to the MRP and three of its candidates in the 1998 general elections. *See* Pet. App. A.

The court of appeals failure to make a case specific determination of the validity of the Missouri party limits as applied in the November 1998 general election raises a question of exceptional importance: whether a state may impose severe sanctions on political speech and association where, as Missouri has conceded, enforcement of campaign contribution limits serves no valid purpose.

A. Government may impose campaign contribution limits only if it has a "sufficiently important" interest. *Colorado II*, 533 U.S. at 456; *Shrink Missouri*, 528 U.S. at 388; *Buckley*, 424 U.S. at 25. Under *Colorado II*, preventing circumvention of individual and PAC contribution limits is the only interest

"sufficiently important" to justify Missouri's party limits.[5] Missouri, however, had no interest in preventing circumvention of individual or PAC contribution limits in November 1998.

The court of appeals had enjoined enforcement of the state's individual contribution limits on July 23, 1998. *Shrink Missouri Government PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998). When the MRP made the disputed contributions to Pierce, Zahnd, and Reid in the 1998 general elections, the state had no reason to enforce the party limits. There were no individual contribution limits that could have been circumvented by the party's contributions. Any individual or PAC could have contributed unlimited sums to any candidate without using a political party as an intermediary.[6]

5. In *Colorado II*, the Court upheld federal limits on coordinated expenditures solely on the ground of "minimiz[ing] circumvention of contribution limits." 533 U.S. at 465. It expressly declined to reach any argument that limits on coordinated expenditures could be "justified by a concern with *quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves." *Id.* at 456 n.18. Thus, any suggestion that the Missouri party limits prevent corruption finds no warrant in *Colorado II*. Any suggestion that the Missouri party limits prevent corruption is also inconsistent with the record. The court of appeals specifically found, in its first opinion, that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." Pet. App. B at 18a. Indeed, as a member of the panel observed in the first opinion, Missouri did not even attempt to justify the party limits on the ground that a political party's contributions to its candidates cause corruption or create the appearance of corruption. *Id.* at 24a-25a & n.1 (Gibson, J. concurring & dissenting)). Missouri argued only that "the [party] limits deter evasion of individual contribution limits." *Id.* at 25a.

6. The court of appeals did observe, in the course of addressing a due process issue, that "[t]he fact that we had declared [individual (Cont'd)

As the district court held, the party limits served no purpose after the limits on individual contributions had been enjoined. L-50 (district court holding that "one of the purported objectives" of the party limits to "thwart[] a person from evading the limit on the amount that he or she can legitimately give to a given candidate . . . ceased to have any force whatsoever" when enforcement of the individual limits was enjoined).

Indeed, Missouri has conceded that it had no reason to enforce the party limits while the individual limits were enjoined in 1998:

> Defendants, all state officials, consented to [district court's January 13, 1999 preliminary injunction barring enforcement of the party limits] because the limits on party committee contributions could have little effect so long as individuals and non-party committees could contribute unlimited amounts directly to candidates."

Missouri's Opp. to Motion for Injunction Pending Appeal (July 14, 2000) at 2.

B. Even though Missouri had no reason to limit contributions made by political parties to their candidates in the November

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(Cont'd)

and PAC] limits unconstitutional had no bearing on the efficacy of the limits on parties and no effect on the MEC's right and duty to enforce those limits." Pet. App. A at 7a. This observation begs the critical point that there were no individual or PAC limits to be circumvented by the MRP's 1998 contributions and, consequently, enforcement of the party limits could not serve any valid state interest.

1998 general election (when enforcement of the individual limits was enjoined), the state is now attempting to hold Pierce personally liable to repay a $126,750 contribution made by the MRP and to hold Zahnd personally liable to repay a $68,375 party contribution.

The candidates spent their party's contributions in good faith in their campaigns, and their campaign committee treasuries were empty or near empty when the MEC initiated enforcement in the closing days of the November 1998 general election. Imposition of these individually severe fines for political activity that occurred while enforcement of individual and PAC contribution limits was enjoined would serve no legitimate state purpose. In the November 1998 general election, any individual or PAC could have contributed $126,750 directly to Pierce or $68,375 directly to Zahnd and would have had no reason to channel a contribution through a political party.

Review of the court of appeals decision would permit the Court to correct a significant miscarriage of injustice: the imposition of substantial sanctions on political candidates where, as the state has conceded, enforcement of party contribution limits serves no valid purpose.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SUBMITTED SEPTEMBER 10, 2001 AND FILED NOVEMBER 2, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; and Elaine Tschee Reid,

Appellees/Cross-Appellants,

v.

Charles G. Lamb, In His Official Capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In His Official Capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In Her Official Capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell, In Their Official Capacity as Members of the Missouri Ethics Commission; and Jeremiah W. (Jay) Nixon, In His Official Capacity as Missouri Attorney General,

Appellants/Cross-Appellees.

Appendix A

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: September 10, 2001

Filed: November 2, 2001

Before BOWMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a suit to enjoin the enforcement of Mo. Rev. Stat. § 130.032.4 and § 130.032.7, which limit the amount of cash and in-kind contributions that political parties may make to a candidate for public office, and provide penalties for violating the limitations that those statutes set. The plaintiffs (a political party, candidate committees, and candidates for public office) asserted that these statutes violated their rights of free speech under the First Amendment. When the district court refused to grant the plaintiffs relief, we reversed and remanded with instructions to the district court to enter an injunction. *See Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000), *cert. granted and opinion vacated sub nom. Nixon v. Missouri Republican Party*, 121 S. Ct. 2584 (2001) (mem.). The state of Missouri then sought a writ of certiorari from the United States Supreme Court; the Supreme Court granted the writ, vacated our judgment, and directed us to reconsider the case in light of *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351 (2001) *(Colorado II)*. *See Nixon*, 121 S. Ct. at 2584. Upon further consideration, we affirm the judgment of the district court.

Appendix A

I.

In *Colorado II*, the Court held that political parties' first amendment claims are entitled to no higher level of scrutiny than claims advanced by individuals or Political Action Committees, and that a state may constitutionally limit the amount of money that a party spends in coordination with its own candidate. 121 S. Ct. at 2366. In upholding the limitations on party contributions found in 2 U.S.C.A. § 441 a(d)(3), the Supreme Court held that there was sufficient evidence in the record before it to support a legislative judgment that unregulated party contributions served to circumvent the contribution limits imposed on individuals set out in 2 U.S.C. § 441 a(a). "What a realist would expect to occur has occurred," the Court said. "Donors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 2367. The Court observed that candidates raise money for parties with the understanding that the candidates will receive party support in proportion to the amount that they raise and that candidates use the promise of future party support as an inducement when soliciting money. *Id.* at 2367-68. The Court further held that 2 U.S.C. § 441a(a)(8), which provides that contributions that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to the candidate, was not so effective a means of preventing circumvention that the First Amendment prevented resort to other means of prevention. The Court believed that holding otherwise would ignore "the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id.* at 2370. "The earmarking provision," the Court concluded, "would reach only the most clumsy attempts to pass contributions through to candidates," and thus further regulation was constitutionally justifiable. *Id.*

This aspect of the Supreme Court's ruling in *Colorado II* effectively undermines our previous conclusion that Missouri's limitations on parties' contributions to its candidates were unnecessary and thus unconstitutional because Missouri already had a law in place that prohibited earmarking agreements. *See Lamb*, 227 F.3d at 1073. The Missouri Republican Party argues vigorously, however, that there is no evidence in the present record that parties' contributions are in fact being used to circumvent Missouri's limitations on contributions by individuals, and that the state has therefore failed to carry its burden to justify the relevant regulation. We believe, however, that it is not necessary for the state to show that circumvention is actually occurring in Missouri, for the factual record developed in *Colorado II* suffices to justify Missouri's conclusion that means other than its earmarking prohibition are necessary to prevent circumvention.

In a closely analogous situation, the Court ruled that "[t]he First Amendment does not require [a legislative body], before enacting ... an ordinance, to conduct new studies or produce evidence independent of that already generated by other [legislative bodies], so long as whatever evidence the [legislative body] relies upon is reasonably believed to be relevant to the problem that the [legislative body] addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). While the state of Missouri of course did not rely on the evidence produced in *Colorado II* to justify its statute, it makes little constitutional sense to invalidate the statute when it would have been perfectly constitutional if it could have been shown that the Missouri legislature (in some collective sense?) had passed the statute with the proper frame of mind. In other words, we think that a statute is constitutional if

there is objective evidence of facts sufficient to render that statute valid, even if those facts were not operating subjectively in the minds of the legislators to motivate them when they enacted that statute. Any other rule would prove unworkable because, among other things, the minds of legislators are largely unknowable, individual legislators have various motives for voting the same way on the same bill, and legislative history is nonexistent in many states.

In short, we think that the holding in *Colorado II* establishes as a matter of law the constitutionality of the Missouri statutes relevant here. We note, too, that the evidence that the Court relied on in *Colorado II* to uphold the federal statute was not in existence when FECA was passed: That evidence was produced by the Federal Election Commission and was based on its experience under FECA. This serves to bolster our confidence in the view already expressed that no predicate record-making by the state of Missouri is necessary before the validity of its statute can be established.

Nor can we say that the limits that Missouri has set on political contributions by parties, though they are much lower than those upheld in *Colorado II*, are so low that they violate the First Amendment. The Supreme Court, in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000), quite emphatically held that the relevant question in the context is whether contribution limits are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Nothing in this record would indicate to us that these circumstances obtain in the state of Missouri at the present time.

We close our consideration of this aspect of the case with the observation that the Missouri Republican Party, in common with other political parties in Missouri, continue to have substantial avenues for expressing their support of their candidates and for maintaining a political and ideological solidarity with them. As the Court observed in *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam), "[a] limitation on the amount of money a person may give to a candidate . . . does not in any way infringe the contributor's freedom to discuss candidates and issues." The mode of discussion that the party chooses, moreover, may include advertising campaigns designated to promote issues and candidates, so long as those campaigns are not coordinated with those candidates. "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees," *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.), and it is therefore not subject to limitation. The Missouri Republican Party may "spend money in support of a candidate without legal limit so long as it spends independently." *Colorado II*, 121 S. Ct. at 2366.

II.

The Missouri Republican Party asserts that a remand is necessary because the district court did not address its claim that its due process rights were violated when the Missouri Election Commission (MEC) misled the Party into believing that there were no enforceable limits on party contributions. The Party asserts that the MEC told it that its contribution limits were ten times the limits on individual contributions,

and, the Party claims, this statement led the Party to believe that there were no limits on its contributions because at the time that the MEC made the statement the limits on individual contributions had been enjoined. That, the argument runs, the MEC was saying that there were no limits on Party contributions because 10 times infinity is infinity.

It is true, as the Party says, that the district court did not address this claim, but we think that that was for a good reason: The Party never made this claim below. Its claim, instead, was that the MEC violated due process when it calculated the limits on parties' contributions by multiplying the limits on individuals by ten because, in *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998), we had enjoined the enforcement of the statutes that set the limit on individuals. We see no merit in this argument. We had not enjoined the enforcement of Mo. Rev. Stat. § 130.032.4, the statute at issue here, and that statute set limits on parties at a figure that was numerically ten times that of the limits on individuals. The fact that we had declared these latter limits unconstitutional had no bearing on the efficacy of the limits on parties and no effect on the MEC's right and duty to enforce those limits. In other words, the MEC, pursuant to one statute, set numbers that were ten times the numbers that appeared in another statute; the fact that the enforcement of the latter statute had been enjoined as unconstitutional cannot furnish the basis for a constitutional claim, even if the limit chosen was not in conformity with state law.

The Party argues, finally, that the district court erred in not addressing its contention that the spending limits were being enforced against it in a discriminatory fashion: The

Party maintains that the MEC has ignored violations of contribution limits by the Missouri Democratic Party and seven of that party's candidates. But the Party never advanced this contention, either as a claim or as a defense, in the court below. The court was therefore not obligated to deal with it. We express no view on the ultimate merits of any action that the Party might bring in the future for discrimination against them in the enforcement of the relevant statutes.

III.

For the reasons indicated, the judgment of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's decision today, with its application of *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S.Ct. 2351 (2001) *(Colorado II)*, and with its opinion except for the last sentence of Part II. But in my view the court does not go quite far enough. Two aspects of the court's decision demonstrate a hesitation to give effect to Missouri's constitutionally valid campaign finance statutes that I think is no longer appropriate.

The court should vacate today its injunctive order of July 31, 2000, preventing Missouri from enforcing Mo. Rev. Stat. §§ 130.032.4 and 130.032.7 (2000), its statutes regulating party contributions to candidates in state elections. The State has requested that our injunctive order be vacated

now. Yet the court today allows the order to remain in force despite the destruction of its legal underpinning.[1]

Our July 31 order, issued over my dissent, was a one-sentence, summary grant of injunction barring enforcement of the party contribution limits pending this appeal. This order made no effort to comply with the standards required by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987), and applied in our decision in *Shrink Missouri Government PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998), and numerous other cases, for determining when an injunction pending appeal may issue.

The Supreme Court's *Colorado II* decision and its order of June 29, 2001 (which vacated our judgment and opinion of September 11, 2000, instructing the district court to enter a permanent injunctive order), returned the case to us for reconsideration. *Colorado II* drastically altered the legal landscape that confronted the court when the original injunction pending appeal was issued. The court today issues an opinion that decides the merits of the case *against* the Missouri Republican Party. The injunction should therefore be dissolved. The burden should be on the Party to demonstrate, *inter alia*, a likelihood of success on the merits (the "most important" factor in deciding whether an injunction should issue, *Adams*, 151 F.3d at 764), should it seek to continue the injunction.

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1. This may in some sense be a technical matter. Lifting our injunction would not have effect until a mandate issues to the district court below. But doing so would signal more strongly than our present opinion does that there is nothing before us to suggest that Missouri's party contribution limits are other than fully enforceable.

Finally, the last sentence in Part II of the court's opinion first speculates on what action may be taken in the future in this litigation, and then disclaims any decision on it. This is dictum, and I do not join in it.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SUBMITTED AUGUST 9, 2000 AND FILED SEPTEMBER 11, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; and Elaine Tschee Reid,

Appellees/Cross-Appellants,

v.

Charles G. Lamb, In His Official Capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In His Official Capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In Her Official Capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell, In Their Official Capacity as Members of the Missouri Ethics Commission; and Jeremiah W. (Jay) Nixon, In His Official Capacity as Missouri Attorney General,

Appellants/Cross-Appellees.

Appendix B

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: August 9, 2000

Filed: September 11, 2000

Before BOWMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a suit to enjoin the enforcement of Mo. Rev. Stat. § 130.032.4 and § 130.032.7, which limit the amount of cash and in-kind contributions that political parties may give to a candidate for public office, and provide penalties for violating the limitations that the statutes set. The plaintiffs (a political party, candidate committees, and candidates for public office) asserted that the statutes at issue violated their rights of free speech under the first amendment. The district court refused to issue an injunction and this appeal ensued. We reverse and remand with directions to the district court to enter an injunction that is not inconsistent with this opinion.

I.

The complaint in this case set out a series of cash contributions that the Missouri Republican Party made to the other plaintiffs in this case, described the actions that the defendants (the members of the Missouri Ethics Commission and the Missouri attorney general) intended to take against the plaintiffs because the contributions exceeded those that

Missouri law allows, and asked for an injunction against the enforcement of the statutes under which the defendants intended to proceed.

The plaintiffs argued to the district court that the monetary expenditures at issue here were not really contributions, as that term is regularly used in cases of this kind, but rather were coordinated expenditures made in conjunction and cooperation with the candidates and their committees. The district court rejected that construction of the facts, and held that there was no genuine factual dispute about the nature of the monetary expenditures involved, because the candidates retained control over how the money was to be spent. We agree with the district court.

We recognize that there will be cases in which the line between a contribution and a coordinated expenditure will be hard to draw, and we concede that that line may frequently be particularly difficult to discern when the case involves money that passes from a party to one of its candidates. That is partly because, for reasons that will presently appear, we believe that it is often difficult to distinguish a party from its candidates at all. But here, as the district court noted, the candidates admitted that, although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit. It is this freedom on the part of the candidates that provides them with the kind of independence that requires us to characterize the money that passed to them as contributions as a matter of law.

This characterization, as the parties recognize, is important to the case because, although the Supreme Court

has not decided the precise issue before us, it has decided that contributions by individuals are subject to limitation, despite the first amendment interests at stake, *see Buckley v. Valeo*, 424 U.S. 1, 20-23 (1976) *(per curiam)*, while independent expenditures by political parties are not, *see Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 608 (1996). Although these cases do not directly rule this one, since it falls somewhere between them, we nevertheless think that they provide guidance on the proper resolution of the questions raised. We believe that the recent case of *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), however, on which the defendants heavily rely, is of limited value in this respect, because, as we explain later, the fact that one of the plaintiffs in this case is a political party serves to distinguish it from *Shrink Missouri Government PAC* in a crucial way.

II.

The most important case for present purposes is *Buckley*, 424 U.S. at 20-21, which held that a limitation on individuals' contributions to candidates for public office was constitutional because such a limitation imposed "only a marginal restriction upon the contributor's ability to engage in free communication." That was because, as the Supreme Court saw it, a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," *id.* at 21. A limitation on contributions, the Court therefore concluded, "involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution," *id.*

We think that these considerations simply do not carry the same force when the contributor is a political party. The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

We are not suggesting that there is always an exact one-to-one correspondence between candidates and their parties. Candidates and parties have their observable differences, and there is truth in the old adage that a platform is something to stand on, not to run on: Candidates are not mere agents or mouthpieces. But parties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard-bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Because of their unity of purpose, and the virtual identity of parties and their candidates, it is not easy to say, in the words of *Buckley*, 424 U.S. at 21, that a political party's contribution "does not communicate the underlying basis for the support." To the contrary, a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly

be called a "contribution" in the same sense that the individual contributions at stake in *Buckley* were. Nor is a party's contribution to its candidate, again in the words of *Buckley, id.*, merely a "symbolic expression" of support; it is more like a substantive political statement than others' contributions are. As we see it, all of this indicates that the first amendment rights at stake here are different from, and weightier than, those that were involved in *Buckley*. *Cf. Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1227-28 (10th Cir. 2000).

III.

The nature and character of political parties are relevant to another important aspect of our consideration of this case, namely, the kind of reason that the government must advance in order to justify an intrusion on first amendment rights. In *Shrink Missouri Government PAC*, 120 S. Ct. at 905-06, the Supreme Court held that preventing the corruption of candidates served as a sufficiently compelling reason to limit the size of contributions from individuals and political action committees. But, as Mr. Justice Thomas has observed, it is not easy to see how a party could "corrupt" one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles. *See Colorado Republican Federal Campaign Committee*, 518 U.S. at 646 (opinion of Thomas, J.). As we see it, the threat that a political party will corrupt a candidate is not a very realistic one.

The defendants suggest alternatively that preventing the circumvention of the limits on individual contributions can

serve to justify regulating the size of party contributions. *See Buckley*, 424 U.S. at 38; *see also id.* at 35-36. *Buckley*, however, upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate. *See id.* at 38. But here the challenged restriction is on the party's giving, and the defendants seek to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving. This scheme burdens the free speech rights of political parties in order to control the activities of someone else. This is something quite different from what *Buckley* approved.

Besides, the defendants admitted in their brief in this case that it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum. Such a contribution, the defendants say, would be treated under Missouri law as a contribution by the individual, not the party. The defendants therefore already have a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit. *Cf.* 2 U.S.C. § 441a(a)(8). Limitations on party spending might have an indirect attenuating effect on secret "earmarking" agreements between individuals and political parties because such agreements may be hard to detect and police directly, but we think that that is too frail a rationale to justify burdening the substantial free speech rights of political parties that we have identified as being in jeopardy in this case. *Cf. Colorado Republican Federal Campaign Committee*, 213 F.3d at 1231-32.

Appendix B

The Supreme Court recently observed that, in deciding cases of this kind, it is important to keep in mind that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," *Shrink Missouri Government PAC*, 120 S. Ct. at 906. In this case, the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented. Since, for the reasons indicated, we think that the justifications advanced for the statutory limitations relevant here are, in the context, novel and not particularly plausible, we hold that the challenged Missouri limitations on cash contributions are unconstitutional.

IV.

The district court refused to allow the plaintiffs to file an amended complaint because it believed that the proposed amendment raised issues with respect to in-kind contributions that the original complaint did not raise. It is true that the amended complaint adverted to the likelihood that most, if not all, in-kind contributions would actually be coordinated expenditures rather than contributions in the purest sense; and it is also true, as the district court noted, that the original complaint emphasized the impending enforcement efforts by the defendants with respect only to cash contributions. But the original complaint did challenge Missouri's statutory limits on in-kind contributions from parties, and the summary judgment materials contained evidence relating to those kinds of contributions. We therefore think that the case papers fairly

raise the matter of in-kind contributions. Given our view of the case, namely, that the limitations on cash contributions are unconstitutional on their face, and given the fact that the defendants have advanced no basis on which, for constitutional purposes, the two kinds of contributions can be distinguished in the present factual context, we hold that Missouri's limits on in-kind contributions also offend the first amendment.

V.

We therefore reverse the judgment of the district court and remand the case for the entry of an injunction that is not inconsistent with this opinion.

JOHN R. GIBSON, Circuit Judge, concurring and dissenting.

I concur in the court's opinion to the extent that it holds that the payments by the party to the candidates were contributions and not expenditures. The candidates' freedom to spend the money as they saw fit requires that the money passed to them be characterized as contributions as a matter of law.

I agree that the Supreme Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), provide guidance. I differ, however, with the court's conclusion that political party contributions are distinguishable from the situation presented in *Buckley* and with the court's assertion that the recent decision in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), is of limited value here.

Appendix B

Buckley developed the groundwork for analyzing the constitutionality of campaign finance laws, distinguishing between contributions and expenditures and concluding that contribution limits impose less severe restrictions on First Amendment rights than expenditure limits. *See* 424 U.S. at 19-23. In *Shrink Missouri*, the Court recognized this distinction in upholding Missouri's limits on contributions made by any person. *See* 120 S. Ct. at 903-04. Significantly, five justices joined Justice Souter's opinion for the Court. True, *Shrink Missouri* does not speak directly to issues involving political party contributions. It does, however, demonstrate the continuing vitality of *Buckley*, and it sets out the standard we must apply here.

The court today asserts that, because of the special nature of political parties, limits on their contributions are more burdensome than limits on contributions by individuals. The court supports its determination that the First Amendment rights of political parties "are different from, and weightier than, those that were involved in *Buckley*" with the novel conclusion that political parties and their candidates share a "virtual identity." While the court asserts that parties and candidates have "observable differences" and that there is not always an exact correspondence between them, it goes on to describe the party/candidate relationship in a variety of ways: a party and its candidate are "virtually indistinguishable from each other" and are "virtual alter egos" whose "identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities." The court tergiversates as it reaches for a description of this relationship. Upon this shifting foundation, the court constructs its entire opinion.

Appendix B

There is no apparent consensus on the Supreme Court about the relationship between political parties and candidates. The *Colorado Republican* plurality (Justices Breyer, O'Connor, and Souter) rejected the argument that "a party and its candidate are identical, i.e., the party, in a sense, 'is' its candidates," pointing out that Congress treats parties and candidates differently by regulating contributions from one to the other. 518 U.S. at 622-23. Concurring and dissenting, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, observed that there is "a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity," along with "a practical identity of interests" between the two during an election. *Id.* at 630. Justice Thomas, also concurring and dissenting and also joined by Chief Justice Rehnquist and Justice Scalia, argued that a political party could not corrupt its candidate because the party's "very aim . . . is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes ." *Id.* at 646. Justice Stevens, joined by Justice Ginsburg, stated in dissent:

> A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party — or the persons who control the party — will abuse the influence it has over the candidate by virtue of its power to spend.

Id. at 648. The various expressions articulated by the court today come closest to Justice Kennedy's observations, but his conclusion that a party and its candidates engage in

joint activity and share interests falls short of the court's conclusion that they are virtually identical, virtual alter egos, or in some way merged.

Regardless of the nature of the relationship, party contributions to candidates can be regulated. Although *Buckley* upheld limits on contributions by individuals and political committees, not political parties, its analysis was framed in a way that leads to the conclusion that it applies to all contributions, no matter what their source. *Buckley* addressed the constitutionality of various restrictions on political contributions and expenditures contained in the Federal Election Campaign Act, an "intricate statutory scheme adopted by Congress . . . that appl[ies] broadly to all phases of and *all participants* in the election process." 424 U.S. at 12-13 (emphasis added). The Court discussed contribution and expenditure limits in a section of its opinion entitled "General Principles," *id.* at 14, preceding any discussion of the specific provisions at issue in the case. This placement indicates that the Court intended to set forth universally applicable precepts. Also telling is the fact that the Court discussed expenditure limits on political parties immediately before contrasting expenditure limits with contribution limits:

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except

> candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.
>
> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

Id. at 19-21 (footnotes omitted). The order of the Court's argument suggests that its discussion of contribution limits is fully applicable to limits on political parties.

Colorado Republican provides further support for the conclusion that *Buckley*'s analysis applies here. The plurality held that the First Amendment prohibited applying the Federal Election Campaign Act's limit on political party expenditures to "an expenditure that the political party has made independently, without coordination with any candidate." *Colorado Republican*, 518 U.S. at 608. The opinion stressed the constitutional difference between contributions and

expenditures that originated in *Buckley*. *See id.* at 614-15. The plurality's emphasis on the "constitutionally significant fact" that the party acted independently, *id.* at 617, demonstrates an assumption that limits on coordinated expenditures by political parties, which are treated as contributions under the Act, would be more likely to withstand constitutional scrutiny. *Cf. California Democratic Party v. Jones*, 120 S. Ct. 2402, 2415 (2000) (Kennedy, J., concurring) (five members of the Supreme Court "subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.").

It is thus evident that the constitutional distinction between contributions and expenditures applies to political party money. The free speech rights of parties are not greater than the free speech rights of individuals and political committees. Speech, after all, is speech, whether expressed by one or by a group formed to convey a common viewpoint. Limits on party contributions are subject to the same level of scrutiny as limits on individual and political committee contributions.

The contribution limits at issue should be upheld if they are closely drawn to meet a sufficiently important interest. *See Shrink Mo.*, 120 S. Ct. at 904. The court relies on what it perceives to be the lack of a sufficiently important interest to hold that the limits are unconstitutional. The court doubts that a political party can corrupt its own candidate, but Missouri does not justify its limits on that ground. Instead,

it explains that the limits deter evasion of individual contribution limits.[1]

A plurality of the Supreme Court upheld limits on contributions to multicandidate political committees because the limits furthered the interest of preventing actual or apparent corruption by limiting "circumvention of the very limitations on contributions that this Court upheld in *Buckley.*" *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 197-98 (1981). Writing separately, Justice Blackmun also concluded "that contributions to multicandidate political committees may be limited . . . as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley.*" *Id.* at 203. *See also Buckley*, 424 U.S. at 38 (upholding a $25,000 overall limit on total contributions made by an individual because it acted to prevent evasion of the $1000 limit on contributions to a particular candidate that the Court held constitutional).

Missouri's justification for the party contribution limits is neither novel nor implausible: in both *Buckley* and *California Medical*, the Supreme Court accepted preventing evasion of a constitutional limit as a sufficiently important governmental interest. The court's insistence on evidence to

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1. Missouri also briefly argues that the party limits address the public's perception of corruption that occurs when large contributions are made to political parties, political parties make large contributions to candidates, and the candidates' decisions mirror the large contributors' positions. This is a variation on the evasion argument. That is, an appearance of corruption may arise if individuals can evade contribution limits by using a political party as a conduit.

support this justification runs counter to these decisions and to the *Shrink Missouri* decision, which held that Missouri's individual limits are justified by its important interest in preventing corruption and the appearance of corruption. *See* 120 S. Ct. at 905-08. If there is sufficient evidence to support individual contribution limits enacted to prevent corruption or the appearance of corruption, it logically follows that there is sufficient evidence to support a contribution limit enacted to prevent evasion of the individual limits.

The court relies on its conclusion that political parties have different and more important free speech rights than individuals to discount Missouri's interest in deterring evasion of its individual contribution limits. Because contributions made by a political party are no different than contributions made by individuals or other groups, this reliance is unfounded.

The remaining issue is whether the limits are closely drawn to meet the government's interest. Under *Shrink Missouri*, a contribution limit will stand unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909. There is no evidence in the record to support a conclusion that Missouri's limits on political party contributions have created such "a system of suppressed political advocacy." *Id.* Because Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment.

I would affirm the district court's judgment.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

2. The court holds that the limits on in-kind contributions offend the First Amendment, an issue not passed upon by the district court. Under my analysis, the in-kind limits are constitutionally valid.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC DATED JANUARY 4, 2002

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, etc., et al.,

Appellees/Cross-Appellants,

vs.

Charles G. Lamb, etc., et al.,

Appellants/Cross-Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge William Jay Riley would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

January 4, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — MISSOURI ETHICS COMMISSION, ADJUSTED POLITICAL PARTY COMMITTEE CONTRIBUTION LIMITS (JAN. 24, 2002)

The contribution limits established by Section 130.032 of the Missouri Revised Statutes increase on January 1 of each even numbered year. At its conference call meeting on January 24, 2002, the Missouri Ethics Commission approved staffs calculation of the inflation adjustments established for political party committee contribution limits.

Monetary contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one general election or opposed primary election shall not exceed the following:

1. To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor of [sic] attorney general, $11,675.00;

2. To elect an individual to the office of state senator, $5,850.00;

3. To elect an individual to the office of state representative, $2,925.00;

4. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under 100,000, $3,000.00;

Appendix D

5. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least 100,000 but less than 250,000, $5,750.00;

6. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least 250,000 $11,750.00.

The amount of contributions which may be made by or accepted from a political party committee in a primary election to elect any candidate who is unopposed in that primary is 50% of the amount stated above for the office in question.

http://www.moethics.state.mo.us/MEC/AdjustedContributionJan2002.htm#Party.

Supreme Court, U.S.
FILED
MAY - 1 2002
OFFICE OF THE CLERK

No. 01-1467

In the
SUPREME COURT OF THE UNITED STATES

Missouri Republican Party, *et al.*,
Petitioners,

v.

Robert F. Connor, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Buckley v. Valeo* and *Nixon v. Shrink Missouri Government PAC*, a district court errs in granting summary judgment in a case challenging one part of a comprehensive set of campaign contribution limits when undisputed evidence shows that the limits did not significantly change the ability of candidates to obtain the funds they need to speak.

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No. 01-1467

In the
SUPREME COURT OF THE UNITED STATES

Missouri Republican Party, *et al*,
Petitioners,

v.

Robert F. Connor, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In the waning days of Missouri's 1998 campaigns, four candidates filed reports with the Missouri Ethics Commission showing that they had accepted contributions from the Missouri Republican Party that exceeded Missouri's limits on party committee contributions, found in Mo. Rev. Stat. § 130.032.4 (2000). The Commission quickly began the enforcement process provided by Mo. Rev. Stat. § 130.032.7 (2000). One of the candidates complied with the law and refunded the excess contribution. The others, with their treasurers and the Missouri Republican Party, instead filed this suit. The suit was held in abeyance, with enforcement preliminarily enjoined, awaiting a

decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (*Shrink Missouri*).

The limits at issue here apply only to political party committees. They are approximately 20 times more than the limits affirmed in *Shrink Missouri* for non-party, ideologically-based committees like Shrink Missouri Government PAC. *Compare* Mo. Rev. Stat. § 130.032.4 and 130.032.2.[1] They apply separately to each political party committee, including regional and local party committees, of which there are dozens for each major political party in Missouri. Thus it is possible for each Missouri candidate to receive more (perhaps far more) than $603,576 in party support – what petitioners characterize

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[1] The district court referred to thee party limits as "ten times higher than" the non-party limits "found constitutional in" *Shrink Missouri*. A-4. (Because petitioners omitted the district court's decision from their appendix, it is included in the appendix to this response.) "Ten times" is only an approximation; the methods used to round the party limits as they increase under an inflation factor often shift those limits, originally precisely ten times the other limits, a few dollars off the precise multiple. But the real problem with citing the "ten times" language is not its minor imprecision, but its incompleteness. The district court was referring only to the limits on cash contributions. For non-party committees, there is no distinction between "in-kind" and cash contributions. But party committees, in addition to the maximum cash contribution, can make an "in-kind" contribution of equivalent value. Mo. Rev. Stat. § 130.032.4. Thus, Shrink Missouri Government PAC can give a candidate cash *and* "in-kind" support with a total value of only a tenth of what a party committee can give in cash alone.

as the maximum allowed under federal law.[2]

The particular events leading to this, the second petition for writ of certiorari filed in this case (*see* No. 00-1136), began on January 24, 2000, when this Court upheld Missouri's limits on contributions by individuals and non-party committees in *Shrink Missouri*. Respondents ("the State" herein) immediately moved to vacate the preliminary injunction. Shortly afterwards, the State served a motion for summary judgment based on the rule that this Court had stated in *Shrink Missouri* – a rule derived from *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus the State argued that the imposition of its limits on contributions by party committees did not create "a system of suppressed political advocacy," 528 U.S. at 396, and that the limits were not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless," *id.* at 397.

To support its motion, the State presented data from past Missouri campaigns, comparing those before with those after contribution limits were imposed. Petitioners responded with a few affidavits from individual party officials and candidates. That response did not create a genuine issue as to any fact material to the *Buckley-Shrink Missouri* test. As the district court determined,

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[2] To reach that figure, petitioners combine the amounts allowed to the national party committee and to the state party committee. *See* Petition at 8 n. 1. But when they then calculate the maximum contribution permitted in Missouri (Petition at 9, n. 2), they ignore all other committees, repeatedly giving as the total contribution allowed from any "political party" what is actually the total allowed for each Missouri party committee.

> the undisputed evidence demonstrates that campaign expenditures by candidates have increased in some cases and decreased in others following the imposition of contribution limits. Contrary to plaintiffs' assertions, this evidence does not create a factual dispute precluding summary judgment. Rather, it establishes that, whatever the source of decreased spending, contribution limits have not suppressed political advocacy system-wide or rendered contributions pointless, especially when overall spending remains quite high in absolute terms.

A-21. The district court found that the "anecdotal evidence" provided by petitioners did not "'point up a system of suppressed political advocacy.'" A-22, quoting *Shrink Missouri*, 528 U.S. at 396.

> At best, these stories are isolated examples of alleged suppression that still do not amount to the system-wide failure required under [*Shrink Missouri*]. At worst, they are simply speculation about the effects of Missouri's contribution limits without any evidence of causation.

A-22. Because the anecdotes were insufficient to create a genuine issue of material fact, the district court entered judgment under Fed. R. Civ. P. 56.[3]

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[3] Petitioners imply there is something helpful in a compilation of Missouri Republican Party contributions the State made in preparation for a merits hearing. Petition at 11-12. But that suggestion's lack of substance is demonstrated by omission: petitioners identify no information would create a genuine issue of material fact material.

For 17 months after *Shrink Missouri* was decided, petitioners' position was not that the Missouri experience with contribution limits demonstrated a violation of the *Buckley-Shrink Missouri* test. They argued, instead, that the Party was constitutionally entitled to more (by implication, more than 20 times more) latitude than are other, non-party committees. In reversing the grant of summary judgment, the U.S. Court of Appeals for the Eighth Circuit initially accepted that argument. It expressly differentiated between the imposition of limits on individuals and committees generally and the imposition of limits on political party committees. Petition Appendix (Pet. App.) at 14a-15a.

But this Court rejected that entire line of argument in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado Republican II*"). This Court then granted the State's petition for writ of certiorari in this case, vacated the first court of appeals decision, and remanded the case for reconsideration. Order of June 29, 2001, in No. 00-1136. On remand, the court of appeals observed that *Colorado Republican II* "effectively undermine[d its] previous conclusion." Pet. App. at 4a. The court of appeals then affirmed the district court's decision, and thus upheld Missouri's limits on contributions by political party committees. *Id.* at 8a. The court reminded petitioners of something that they, as shown by their decision to omit reference to it, would have this Court forget:

> [T]he Missouri Republican Party, in common with other political parties in Missouri, continue[s] to have substantial avenues for expressing their support of their candidates and for maintaining political and ideological solidarity with them.

Id. at 6a, citing *Colorado Republican Campaign Comm. v.*

FEC, 518 U.S. 604, 616 (1996) (*Colorado Republican I*) (opinion of Breyer, J.).

REASONS FOR DENYING THE WRIT

1. Petitioners cite no conflict between the decision below and that of any other court. Indeed, the only other courts to consider the constitutionality of comparable state laws concluded, as did the Eighth Circuit, that those laws are constitutional. *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied* 528 U.S. 1153 (2000); *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999), vacated, *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 486-87 (D. Vt. 2000). That unanimity belies the need for the Court to consider this case.

2. Unable to find a direct conflict with a decision by any other court, petitioners instead allege an oblique incon-sistency between the decision below and two of this Court's precedents, *Shrink Missouri* and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2000). The point that petitioners draw from those precedents is that there must be "a case specific inquiry to determine the validity of Missouri's party limits." Petition at 8. Curiously, they did not insist on such an inquiry when they argued to this Court fourteen months ago that it should deny certiorari in No. 00-1136, in which the State sought review of a court of appeals decision holding unconstitutional Missouri's limits on party contributions to candidates, despite the absence of a "case specific inquiry" of the sort that petitioners now insist is required.

Now, petitioners entirely ignore the extent of the district court's inquiry. They treat this as if it were the first Missouri case, ignoring the findings in *Shrink Missouri* and "the

campaign finance data submitted [to the district court] by both parties, which includes evidence presented to the Supreme Court in" *Shrink Missouri*. A-21. They fail to identify any evidence that could lead any court "to find that [this Court's] conclusions in [*Shrink Missouri*] do not apply with equal force" to the campaigns that were the subject of petitioners' anecdotal submissions. A-20. In fact, the evidence before the district court exceeded the evidence before the district court in *Shrink Missouri*, and was sufficient to support both the district court's and the court of appeals' decisions.

Petitioners nonetheless insist upon a particular finding by the lower courts as to "'[t]he degree to which speech is suppressed . . . under'" Missouri's scheme. Petition at 11, quoting *Lorillard*, 533 U.S. at 563. But in their insistence, they drag a single phrase from *Lorillard* well out of its proper context. This court said:

> The degree to which speech is suppressed – or alternative avenues for speech remain available – under a particular regulatory scheme tends to be case specific. See, *e.g.*, [*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986)]. And case specific analysis makes sense, for ... the impact of a restriction on speech will undoubtedly vary from place to place.

533 U.S. at 563. Both *Shrink Missouri* and this case, of course, involve the same "regulatory scheme" and the same "place." The court of appeals merely recognized that when the holding in *Colorado Republican II* is added to the mix of the holding in *Shrink Missouri* and the data regarding campaign spending submitted to the district court, there is, as the district court held, no basis for rejecting Missouri's limits on party contributions. *See* A-20-A-22 & n. 7. That is particularly true where, as per

this Court's holding in *Colorado Republican I*, political parties are free to make independent expenditures – an obvious "alternative avenue for speech."

In following *Shrink Missouri* and upholding Missouri's more generous limits on party contributions, the court of appeals did not create a new rule permitting "generic approval of all party contribution limits." Pet. at 15. Its decision is specific to Missouri, to the party limits now in place, and to the manner in which they have affected Missouri campaigns. The holding leaves open the possibility of challenge to another set of contribution limitations. It even leaves open the possibility of a renewed challenge to these limits – when, if ever, a plaintiff shows that conditions have changed so that the limits create "a system of suppressed political advocacy" or that they "drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397.

3. Petitioners' contention that the decisions in this case have created a "significant miscarriage of justice" meriting immediate consideration (Petition at 16) cannot be reconciled with their own recent behavior. The ultimate results of the application of the law, now upheld, to these candidates has yet to be determined. Enforcement was enjoined until the Eighth Circuit ruled on remand from this Court. Once the injunction was lifted, the Commission notified the petitioners of the amounts due and owing under the law. Without waiting for the State to sue to enforce the assessments, petitioners challenged them. All petitioners filed suit in the Circuit Court of St. Louis County, *Pierce, et al., v. Donahue, et al.*, No. 02CC-001042. Petitioners Zahnd and Keith also filed complaints in Missouri's Administrative Hearing Commission, Nos.02-0387 and 02-0389. Those proceedings are just getting underway. The suggestion that absent action by this Court there will be a "significant miscarriage of justice" is, at best, premature.

Moreover, whatever the ultimate impact of the Missouri law on these petitioners, it will be the result of their own willful behavior. They made and accepted contributions over unambiguous statutory limits, at a time when those limits had never been challenged in any court. Their choice to proceed was a studied one, made in order to advance their own interests. The benefits they gained by spending, during the waning days of their campaigns, large sums that were illegally contributed cannot be taken away. If there are counterbalancing sanctions, they will be ones that anyone who read the statute could and should have anticipated.

CONCLUSION

For the reasons stated above, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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May 1, 2002

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:98CV1909 CDP

MISSOURI REPUBLICAN PARTY, et al.,
Plaintiffs,

v.

CHARLES G. LAMB, et al.,
Defendants.

June 22, 2000

MEMORANDUM OPINION

Missouri law limits the amount of money political parties can give to candidates for public office. The Missouri Republican Party and the individual plaintiffs argue that these statutory limits violate their First Amendment rights to freedom of speech and association. I believe that under the Supreme Court precedent of *Nixon v. Shrink Missouri Gov't PAC* the limits are constitutional, and I will therefore grant the state's motion for summary judgment.

I. Background Facts

The particular provision of Missouri's campaign finance

reform law at issue in this case is found at Missouri Revised Statute § 130.032.4. That section limits the amount of cash and in-kind contributions that a political party committee can make to a candidate in any one election:

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general, ten thousand dollars;
>
> (2) To elect an individual to the office of state senator, five thousand dollars;
>
> (3) To elect an individual to the office of state representative, two thousand five hundred dollars; and
>
> (4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

Missouri Revised Statute § 130.032.2 requires that the limits contained in § 130.032.4 be adjusted for inflation in each even-numbered year by a calculation employing the cumulative consumer price index. In early 1998, the Ethics Commission increased the limits listed in § 130.032.4(1)-(3) to $10,750, $5,250, and $2,750, respectively.

A committee that accepts party contributions in excess

of the statutory limits is subject to a significant penalty, unless it promptly returns the contribution to the contributor after being so instructed by the Ethics Commission. *See* Mo. Rev. Stat. § 130.032.7. The per-contribution penalty is one thousand dollars plus an amount equal to the contribution. The candidate and the candidate committee treasurer or deputy treasurer are personally liable for payment of that penalty. Alternatively, they may pay the penalty from campaign funds existing on the date that the committee was notified of the violation by the Ethics Commission. *Id.*

Plaintiff Missouri Republican Party is a political party committee as defined by Mo. Rev. Stat. § 130.011(25). The individual plaintiffs are political candidates and candidate committees as defined by Mo. Rev. Stat. § 130.011(9) and officers of such candidate committees. Defendants are the executive director and members of the Missouri Ethics Commission and the Missouri Attorney General.

In the 1998 general election, the Missouri Republican Party made monetary contributions to several of the candidate committee plaintiffs. Those contributions exceeded the statutory limits. As a result, the Ethics Commission notified those plaintiffs that they were in violation of § 130.032.4's limits, and demanded that they return the Missouri Republican Party's contributions that exceeded the limits. After being advised that plaintiffs would file suit to enjoin enforcement of § 130.032.4, the Attorney General's office advised plaintiffs' counsel that the Ethics Commission would not seek to enforce the statute against plaintiffs pending a hearing on their request for a preliminary injunction. Plaintiffs then filed this action.

II. Procedural History

On January 13, 1999, I enjoined enforcement of § 130.032.4. *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d

1161 (E.D. Mo. 1999). At the parties' joint request, I later stayed all further proceedings pending the United States Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC, cert. granted,* 119 S. Ct. 901 (1999).

On January 24, 2000, the Supreme Court decided *Nixon*, and upheld Missouri's limits on campaign contributions made by individuals and entities other than political parties. *Nixon v. Shrink Missouri Gov't PAC,* 120 S. Ct. 897 (2000). Based on that opinion, defendants asked me to vacate the injunction in this case. On March 13, 2000, I denied the motion to vacate the preliminary injunction. I set the case for expedited treatment and trial on July 5, 2000.

Defendants moved for summary judgment, contending that the contribution limits at issue here, which are approximately ten times higher than those found constitutional in *Nixon*, do not violate the First Amendment as a matter of law. In opposition, plaintiffs claim that factual disputes regarding the nature of the party's financial support of its candidates preclude summary judgment.

After careful consideration of *Nixon* and the parties' summary judgment submissions, I find that there are no factual issues remaining for trial: *Nixon* governs this case and requires me to uphold Missouri's campaign contribution limits on political parties as a matter of law.

III. Discussion

A. Standards Governing Summary Judgment

In determining whether summary judgment should issue, I have viewed the facts and inferences from the facts in the light most favorable to the nonmoving parties, here the plaintiffs. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*

Corp., 475 U.S. 574, 587, (1986). Under the governing standard, the defendants have the burden to establish both the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Applying this standard, I find no genuine disputes of material fact that would preclude summary judgment. Instead, the issues I must decide are purely legal: 1) whether the Republican Party's financial support of its candidates should be characterized as contributions or expenditures;[1] and 2) if they are contributions, whether the limits survive as a matter of law under the standards set forth in *Nixon*.

B. Leave to Amend

Before turning to the merits, I must decide whether to permit plaintiffs to amend their complaint to challenge Missouri's limits on coordinated expenditures, which may be regulated as "in-kind" contributions under § 130.032.4.[2] The

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[1] I disagree with plaintiffs' contention that I must first decide whether justifications for limits on individual contributions also apply to political parties before I can classify the financial support as either contributions or expenditures. Instead, the financial support must be characterized first and the state's rationale for regulating the support comes into play only after I decide that the money is, in fact, contributions.

[2] Plaintiffs also propose amendments concerning: 1) inflation adjustment of the political party contribution limits; 2) events in this case and the litigation involving Missouri's individual limits that have occurred since the filing of the original complaint; and 3) the test for review of contribution

original complaint only challenged the cash contributions, but the proposed amendment alleges that the statute prohibits "coordination." This is a significant substantive change in the legal challenge to the statute, it has no factual tie to the enforcement action plaintiffs are threatened with here, and adding it would surely delay resolution of this case. I will deny leave to amend.

While leave to amend shall be freely given when justice so requires, Fed. R. Civ. P. 15(a), the Court may exercise its discretion and deny leave "when late tendered amendments involve new theories of recovery and impose additional discovery requirements" resulting in undue prejudice to the opposing party. *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998).

Plaintiffs present their proposed amendments regarding coordinated expenditures nearly two years after this case was filed. Although the proceedings in this matter were stayed pending the Supreme Court's decision in *Nixon* pursuant to an agreement between the parties, the case upon which plaintiffs principally rely to support their new "expenditures" argument, *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) (plurality), was decided two years before they filed suit. Plaintiffs could have raised this issue in their original complaint (assuming they had facts to support such a challenge), but instead they merely challenged the constitutionality of the statute as it related to Missouri's impending enforcement proceedings against them for cash contributions in excess of the statutory limits. Although I will consider plaintiffs' argument that the limits on cash

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limits articulated in *Nixon*. Defendants do not object to these proposed amendments and, the Court shall accordingly grant plaintiffs leave to amend as to these allegations only.

contributions should really be treated as expenditures, it is too late in the day to allow plaintiffs to challenge in this suit a different kind of financial support than was pleaded in the original complaint.

Plaintiffs' proposed amendments would also impose additional discovery requirements upon the parties and further delay final resolution of this case. Although in a different case these factors might not preclude granting leave to amend, the interests of justice favor timely resolution of the issues now before me. Defendants would be unduly prejudiced if plaintiffs were permitted to interject new issues into the case and impede a speedy and final ruling on the merits.

C. Contributions vs. Expenditures

Despite their position during the earlier phases of this case, plaintiffs now contend that the Missouri Republican Party's financial support of its candidates -- even if paid to the candidates directly -- should be classified as expenditures. The shift in plaintiffs' position is presumably to avoid application of *Nixon* and to fit this case within other Supreme Court precedent more favorable to plaintiffs' position.

So what, then, is at issue in this case: expenditures or contributions? There is no dispute that the financial support at issue in this case was money given directly to the candidates by the Missouri Republican Party. The Party gave money to the candidates, and the candidates themselves -- not the Party -- spent the money. I believe these are contributions as a matter of law.

The distinction between contributions and expenditures is at the heart of this debate because, "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of

contributions into political debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam). *Nixon* quoted and reaffirmed *Buckley* on the significance of the difference between giving money and spending money:

> "[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing. At most, the size of his contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." [*Buckley*, 424 U.S.] at 20-21, 96 S. Ct. 612 (footnote omitted).
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> . . .
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> We flagged a similar distinction between expenditure and contribution limitations in their impacts on the association right. While an

> expenditure limit "precludes most associations from effectively amplifying the voice of their adherents," *id.*, at 22, 96 S. Ct. 612 (thus interfering with the freedom of the adherents as well as the association), the contribution limits leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," ibid.; see also id., at 28, 96 S. Ct. 612.

Nixon, 120 S. Ct. at 903-04.

In this case Missouri treated the Republican Party's money transfers to its candidates as contributions. It is true, as plaintiffs suggest, that the state's label of this kind of support as a "contribution" does not transform its financial support of its candidates into a "contribution" for constitutional purposes. *Buckley* and *Nixon* do that.

In an effort to reclassify the contributions as expenditures, plaintiffs make much of the fact that the Missouri Republican Party and its candidates engage in a "significant degree of coordination, consultation, and cooperation" before the money is donated. For example, John Hancock testified that "[t]he Missouri Republican Party generally makes contributions to candidates in cooperation and concert with those candidates in order to advance the candidate's chance to-win and to advance the party's objectives." (Hancock Aff. 11/13/98 ¶ 5). Moreover, plaintiffs contend that there is a tacit understanding that the candidate should use the Missouri Republican Party's contributions to convey their shared message. In his most recent affidavit, Hancock also avers that the Missouri Republican Party's comprehensive control over its cash contributions to its candidates is demonstrated by the fact that if a candidate does not use the funds in the manner demanded

by the party, the Missouri Republican Party will refuse to contribute additional monies to the wayward candidate. (Hancock Aff. 3/12/ 00 ¶ 39).

Despite this purported tight-fisted control over the way the funds are spent and the candidates' future cash-flow, the undisputed fact remains that it is the candidate, not the Missouri Republican Party, who spends the money. Plaintiffs Pierce, Zahnd and Reid testified that "once my committee received the [Missouri Republican Party's] contributions, I was free to spend the money as I saw fit." (Pierce Aff. 11/16/ 98 ¶ 4; Zahnd Aff. 11/16/ 98 ¶ 3; Reid Aff. 11/16/ 98 ¶ 4). There is some dissenting authority that all monies spent by a political party -- whether independently or in coordination with a candidate -- should be treated as expenditures, see *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n,* 518 U.S. 604 (1996) (Kennedy, J. dissent), but even that reasoning would not apply here because the candidates, not the party, are spending the funds.[3] The transformation of the Missouri Republican Party's contributions into political debate involves speech by the individual plaintiffs Pierce, Zahnd and Reid, not by the Missouri Republican Party. *See Buckley*, 424 U.S. at 21. For this reason, plaintiffs' attempt to reclassify the cash support as expenditures rather than contributions fails.

C. Contribution Limits on Political Parties after *Nixon*

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[3] Of course, under Justice Thomas' approach in *Colorado Republican*, the distinction between expenditures and contributions would be eliminated for purposes of determining the constitutionality of campaign finance legislation because he "rejects the framework established by *Buckley v. Valeo* . . . ." 518 U.S. at 631 (Thomas, J.).

Of course, the determination that the money given should be considered a contribution does not end the constitutional inquiry, for states are not free under the First Amendment to impose contribution limits without rhyme or reason. I must now decide whether and how Missouri may regulate contributions by political parties. The answer to the "whether" question depends on whether contributions made by political parties are subject to the same standards applied to contributions made by individuals and entities other than political party committees. If they are, there is little doubt that *Nixon* answers the "how" question.

1. The "Whether" Question

In *Nixon*, the Supreme Court adopted the analytical framework first set out in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and held that state contribution limits "could survive if the [g]overnment demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tuned." *Nixon*, 120 S. Ct. at 904 (internal quotation marks and citations omitted). Rather than setting a specific dollar amount as the minimum constitutional threshold for contribution limits, the Supreme Court defined the relevant test as "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909.

In support of its holding, the Court reaffirmed the distinction between contributions and expenditures for purposes of evaluating the constitutionality of campaign finance legislation. *Id.* at 903-05. The Court also accepted the state's espoused interests in defending the legislation (the prevention of corruption and the appearance of corruption) without the rigorous evidentiary showing required by the Eighth Circuit in

its decision in the case, *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998). Instead, the Court relied in part upon the evidence presented in *Buckley* to demonstrate that the state's anti-corruption rationale was sufficiently supported to justify Missouri's contribution limits on individuals. 120 S. Ct. at 905-08.[4]

Although *Nixon* does not directly answer the question of whether contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals, it answers the question indirectly by making clear that their constitutionality hinges on the type of financial support being given to the candidate, not on the identity of the contributor: "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." *Nixon*, 120 S. Ct. at 904 (quoting *Federal Election Com'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986)). The *Nixon* decision affirms the validity of Missouri's contribution limits generally and the state's supporting anti-corruption rationale. Because *Nixon* expressly approved Missouri's claimed interests in limiting individual contributions, it follows that the state's corresponding limits on political parties must also be upheld as long as the same rationale applies and they meet the criteria set out in *Nixon*.

Defendants assert that limits on contributions by

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[4] While declining to further define the state's evidentiary obligations in connection with justifying contribution limits, the Court also pointed to the "evidence introduced into the record by respondents or cited by the lower courts in this action and the action regarding Proposition A [as] enough to show that the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* at 907.

political parties are constitutionally justified because they: 1) prevent evasion of the very contribution limits on individuals that *Nixon* upheld (the "anti-evasion rationale"); and 2) promote the state's interest in preventing corruption and the appearance of corruption in the electoral process (the "anti-corruption rationale"), an interest expressly approved by the Court in *Nixon*.

Plaintiffs attack the state's rationale by claiming: 1) the state's espoused anti-corruption interest loses its force in the context of contributions by political parties; and 2) the contribution caps on political parties do not promote the state's anti-evasion rationale because they do not prevent evasion of the individual contribution limits.

Plaintiffs' first point finds support in *Colorado Republican*, where the Supreme Court held that limits on independent expenditures by political parties in federal elections violate the First Amendment. 518 U.S. at 618. Seven members of the Court supported the Court's judgment that limits on a political party's independent expenditures (i.e., expenditures made by a political party that are not coordinated with a candidate) violate the First Amendment. Justice Breyer announced the judgment of the Court and delivered an opinion, joined by Justices O'Connor and Souter, finding that limits on independent expenditures violate the First Amendment. Four other members of the Court -- Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas -- would have held that limits on both independent and coordinated expenditures (which are considered contributions pursuant to § 441a(a)(7)(B)(I) of the Federal Election Campaign Act or FECA) violate the First Amendment. *Id.* at 626. Justices Kennedy and Thomas each authored opinions concurring in the judgment and dissenting in part. It is these opinions upon which plaintiffs so heavily rely.

Justice Kennedy argued that the "central holding" of *Buckley* is "that spending on one's own speech must be permitted, . . . and this is what political parties do" when they make expenditures on behalf of their candidates. *Id.* at 627. For this reason, Justice Kennedy would have held that "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee," and both are protected by the First Amendment. *Id.* at 630. However, Justice Kennedy also recognized that "Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley, but that type of regulation is not at issue here." *Id.* Unfortunately for plaintiffs, that is exactly the type of regulation at issue here, so Justice Kennedy's opinion does not provide supporting authority for their position.

Justice Thomas' opinion provides more help to plaintiffs. He found that the "anti-corruption rationale" for contribution limits "loses its force" when "applied in the specific context of campaign funding by political parties" as follows:

> What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes . . . For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.

518 U.S. at 646. While I find Justice Thomas' reasoning concerning the nature of political parties appealing as a policy statement, I believe that *Nixon* requires me to reject it for purposes of deciding this case.

The *Nixon* Court distinguished *Colorado Republican* as inapposite on contribution limits because "the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." 120 S. Ct. at 907 . Given this latest pronouncement by (a majority of) the Supreme Court on the inapplicability of *Colorado Republican* to campaign contribution limits, I am not free to strike down Missouri's contribution limits by relying upon partially dissenting opinions issued in that case.

I am also not persuaded that the reasoning of the lower courts which considered the *Colorado Republican* case on remand has any application to this case. First, I do not believe the Tenth Circuit correctly applied *Nixon*.[5] More importantly,

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[5] Because the Supreme Court lacked a majority to decide the "broader issue" of the constitutionality of coordinated expenditures, it remanded the case for further development of that issue. 518 U.S. at 626. A substantial additional record was created and then the district court, ruling before *Nixon* was decided, found that limitations on coordinated expenditures by political parties also violated the First Amendment. *See Federal Election Com'n v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1213 (D. Col. 1999). The Tenth Circuit then affirmed, in a decision rendered after *Nixon*, and held that the FEC had failed to meet its burden of showing that the anti-corruption rationale applied to political party coordinated expenditures, which FECA defines as "contributions." *Federal Election Com'n v. Colorado*

this case is about money the Missouri Republican Party gave to the candidates, not about money the Republican Party spent on radio ads or other candidate campaign needs.

When the anti-corruption rationale is viewed in tandem with the anti-evasion rationale, as I believe it should be, Justice Thomas' *Colorado Republican* reasoning becomes less persuasive. Missouri's contribution limits on political parties work to prevent corruption and the appearance of corruption in part by precluding contributors from evading the state's individual limits found constitutional in *Nixon.*

Beginning in *Buckley,* the Supreme Court recognized the need to deter evasion of individual limits as a constitutionally valid justification for imposing additional contribution limits. The *Buckley* Court upheld FECA's $25,000 "per election cycle" ceiling on the amount of contributions by a single individual to any combination of candidates for federal office as follows:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest

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Republican Federal Campaign Committee, 2000 WL 554688 (10th Cir. May 5, 2000). Although the Tenth Circuit majority stated that it was applying the *Nixon* standard, I believe that it in fact imposed a higher evidentiary burden not unlike that previously required by the Eighth Circuit and overruled by *Nixon.* Certainly, the Tenth Circuit expressed "difficulty" and "question" in applying the standard to party coordinated expenditures, *id.* at *5, stating that "simple cubbyholding of constitutional values under the labels of 'contribution' and 'expenditure' cheapens the currency." *Id.* at *11.

> restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

424 U.S. at 38. The Supreme Court upheld this "corollary" provision of FECA without any discussion of the issues of corruption, the appearance of corruption or other compelling interests that it discussed at length in connection with upholding the per candidate contribution limits on individuals. *Id.*

The Supreme Court later applied the anti-evasion rationale to uphold limits on contributions made to political action committees in *California Medical Assoc. v. Federal Election Comm'n*, 453 U.S. 182 (1981). Justice Marshall, delivering a part of the opinion of the Court in which only four justices joined, noted that "Congress enacted [the limitations on contributions to political action committees] in part to prevent circumvention of the very limitations on contributions that this Court upheld in Buckley." *Id.* at 197-98 (Marshall, J.). He further stated that "it is clear that this provision [of FECA] is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in Buckley." *Id.* at 199. Casting the deciding fifth vote, Justice Blackmun agreed that even under a rigorous standard of review, "contributions to multi-candidate political committees may be

limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in Buckley." *Id.* at 203 (Blackmun, J.). This result followed because "[t]he statute challenged here is thus analogous to the $25,000 limitation on total contributions in a given year that Buckley held to be constitutional." *Id.* Once again, the Court upheld the statute without requiring a separate evidentiary showing that the ancillary limits actually prevented corruption or the appearance of corruption.

Given these cases establishing the importance of ancillary contribution limits to deter evasion of individual limits, the state may justify its contribution limits on political parties with its stated rationale.[6] Plaintiffs protest that defendants have not provided sufficient evidence demonstrating that contribution limits on political parties are necessary to deter evasion of the individual limits in this particular case. They also contend that the statute does not actually deter evasion, because determined contributors can easily circumvent the individual limits even with the political party contribution limits in place. These arguments fail.

As for plaintiffs' first argument, the Supreme Court in *Nixon* made clear that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 120 S. Ct. at 906.

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[6] Even the recent Tenth Circuit decision following remand in *Colorado Republican* recognized the validity of the anti-evasion rationale, stating that "if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit." 2000 WL 554688 at *10.

Because the Supreme Court has plainly recognized the anti-evasion rationale as sufficient to justify ancillary contribution limits, *see Buckley*, 424 U.S. at 38, the state's use of the same justification here cannot be deemed "novel" or "implausible." Moreover, the Supreme Court has never required empirical proof independent of that needed to justify individual contribution limits to legitimate reliance upon the anti-evasion rationale. *See id.; CalMed*, 453 U.S. at 197-99 (Marshall, J.); *id.* at 203 (Blackmun, J. concurring). Missouri certainly does not need to present evidence to justify its individual contribution limits after *Nixon*, and it does not need to present empirical proof to justify the state's interest in combating evasion of those limits through the use of contribution limits on political parties after *Buckley*.

Plaintiffs' second argument also fails. *Nixon* makes clear that the state's contribution regulations need not be the least restrictive means available for addressing the issue of campaign finance reform, only that they be "closely drawn" to match a "sufficiently important interest." 120 S. Ct. at 904. Because Missouri's contribution limits on political parties do prevent individuals from using political parties as a conduit for making large contributions to a candidate in excess of the individual limits (even if it does not eliminate the practice entirely), I find the statute is "closely drawn" to meet this "sufficiently important interest." *See id.* That Missouri could, or even should, enact more stringent campaign finance laws to quash this practice in its entirety does not invalidate the salutary measures already in effect.

For these reasons, Missouri may regulate contributions by political parties under the standards set forth in *Buckley* and *Nixon*.

2. The "How" Question

Because *Buckley* and *Nixon* govern the outcome of this case, Missouri's campaign contribution limits on political parties do not violate the First Amendment unless they are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 120 S. Ct. at 909.

Plaintiffs cannot seriously contend that the contribution limits at issue here would run afoul of *Nixon*, given that they were enacted in conjunction with Missouri's individual limits and that "in the period since the Missouri limits became effective candidates for state elected office have been quite able to raise funds sufficient to run effective campaigns, and . . . candidates for political office in the state are still able to amass impressive campaign war chests." *Id.* at 909 (internal quotation marks and citations omitted).[7]

For a limit to be unconstitutional, there must be a

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[7] Although *Nixon* only involved the race for state auditor (one of the races also challenged here), the evidence presented to me in that case included campaign finance data from races for other state offices. *See Shrink Missouri Gov't PAC v. Adams*, 5 F. Supp. 2d 734, 740-41 (E.D. Mo. 1998). In finding that "candidates for state elected office have been quite able to raise funds sufficient to run effective campaigns, and . . . candidates for political office in the state are still able to amass impressive campaign war chests," *Nixon*, 120 S. Ct. at 909, the Supreme Court also relied on this evidence. I therefore agree with defendants that the Supreme Court's findings on this point are not simply limited to the race for state auditor. In any event, there has been no evidence presented in this case that would lead me to find that the Supreme Court's conclusions in *Nixon* do not apply with equal force to Missouri's state senate campaigns as well.

"showing that the limits were so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. As *Nixon* made clear, such a showing cannot be made through isolated examples of how a contribution limit has impeded a candidate's fundraising ability. 120 S. Ct. at 909. Instead, the test requires a showing of a "system" of suppressed speech, *see id.* , a showing that is practically precluded by the Supreme Court's recent determination that such a system does not exist in Missouri's current political climate. Given the Supreme Court's findings on this point, I fail to see how the contribution limits on political parties -- which are ten times higher than those found constitutional in *Nixon* -- could destroy Missouri's burgeoning campaign climate and create a system of suppressed political advocacy.

I have carefully reviewed the campaign finance data submitted by both parties, which includes evidence presented to the Supreme Court in *Nixon*. I see no reason to engage in a lengthy recitation of that data here. Based on these submissions, I find no evidence that the contribution limits on Missouri's political parties have "impede[d] the ability of candidates to amass the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. Instead, the undisputed evidence demonstrates that campaign expenditures by candidates have increased in some cases and decreased in others following the imposition of contribution limits. Contrary to plaintiffs' assertions, this evidence does not create a factual dispute precluding summary judgment. Rather, it establishes that, whatever the source of decreased spending, contribution limits have not suppressed political advocacy system-wide or rendered contributions pointless, especially when overall spending remains quite high in absolute terms.

Nor does plaintiffs' anecdotal evidence -- which includes stories from the former chair of the Missouri

Republican Party about a candidate who allegedly declined to run for state representative in 1998 because he could not receive more start-up funds and the party's discouraging a primary election campaign between two of the Republican Party's gubernatorial candidates in 1996 because of contribution limits -- "point up a system of suppressed political advocacy that would be unconstitutional under Buckley." *Nixon*, 120 S. Ct. at 909. At best, these stories are isolated examples of alleged suppression that still do not amount to the system-wide failure required under *Nixon*. At worst, they are simply speculation about the effects of Missouri's contribution limits without any evidence of causation. In either event, they do not preclude summary judgment.

IV. Conclusion

Were I writing this opinion on a blank slate, I might well conclude that political parties should be exempted from the legal standards governing other kinds of campaign contributors because of their special role in American politics. I might even adopt the approach advocated by Justice Thomas in *Colorado Republican* and begin with the premise that "[i]n principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy." 518 U.S. at 640 (Thomas, J.). I am not writing on blank slate, however, and cannot disregard the teachings of our highest court in favor of a different rule of law. I therefore find that Missouri's campaign contribution limits on political parties do not violate the First Amendment. This is a matter of law: there are no factual disputes remaining for trial, and so I will grant summary judgment to defendants.

The parties have indicated both to me and to the Eighth Circuit Court of Appeals that an appeal of this decision is

certain. Despite my belief that this decision is the correct one under Supreme Court precedent, I remain concerned about the same issues that convinced me to leave the preliminary injunction in place pending this decision. I will therefore withhold granting the motion for summary judgment and entry of final judgment for a short time, to give the parties an opportunity to tell me their positions regarding an injunction pending appeal.

I believe resolution of this issue is best suited to an oral argument rather than further briefing. The trial of this matter set for July 5, 2000, will, of course, not be necessary, so the Court will use that time for the hearing.

Accordingly,

IT IS HEREBY ORDERED that the parties shall appear in Courtroom 3B at 9:30 a.m. on Wednesday, July 5, 2000, to present their positions regarding whether I should issue an injunction pending appeal. Final judgment in accordance with this opinion will not be entered until after the hearing and, of course, the preliminary injunction will remain in effect until that time.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to amend their complaint [#64] is granted only to the extent set out in footnote 2 of this opinion, and is denied in all other respects.

IT IS FURTHER ORDERED that defendants' motion to compel and in limine [# 76-1, 76-2] is denied as moot.

IT IS FURTHER ORDERED that as no trial will take place, the parties are not obligated to file pretrial submissions.

/s/
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of June, 2000.